Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of	)	MM Docket No. 88-577
	)	
LIBERTY PRODUCTIONS, A LIMITED PARTNERSHIP	)	File No. BPH-870831MI
	)	
WILLSYR COMMUNICATIONS LIMITED PARTNERSHIP	)	File No. BPH-870831MJ
	)	
BILTMORE FOREST BROADCASTING FM, INC.	)	File No. BPH-870831MK
	)	
SKYLAND BROADCASTING COMPANY	)	File No. BPH-870831ML
	)	
ORION COMMUNICATIONS LIMITED	)	File No. BPH-870901ME
	)	
For a Construction Permit for a New FM Broadcast Station on Channel 243A at Biltmore Forest, North Carolina	)	

To: The Commission

BFB'S OPPOSITION TO SUPPLEMENTAL BRIEF

Biltmore Forest Broadcasting FM, Inc. ("BFB"), by its attorneys, hereby opposes the "Supplemental Brief" filed on December 23, 1999 by Liberty Productions, Ltd. ("Liberty"). Liberty attempts to reargue the same facts previously presented to the Administrative Law Judge, the Review Board and the full Commission. BFB will not here address in detail the compelling factual basis supporting the ALJ's disqualification of Liberty on grounds of misrepresentation.[1] Among the many damning facts ignored by Liberty in its Supplement are the fact that the landowner (Ms. Utter) categorically and repeatedly swore that she had never assured Liberty that it could use her property. I.D. at Para. 37. This is fully consistent with the fact that the landowner had already leased her land to another applicant and had demanded a payment for that lease. That Liberty knew

[1] BFB understands that Willsyr Communications will be presenting a detailed citation to the record evidence supporting the ALJ's determination.

about the prior lease – and thus the landowner's requirement that she be paid for any lease assurance – can be readily found from both the landowner's sworn statement that she told them of the lease and Liberty's attempt to locate its transmitter on a spot on the Utter property which was less advantageous from a transmitting standpoint but was distinct from the area which Orion had already claimed. All of these facts were determined by the ALJ after assessing the credibility and motives of the Liberty witnesses who appeared before him, and they fully support a finding that Liberty knowingly specified and certified to the availability of the Utter site without any sound basis for doing so. Rather than rehashing these facts, BFB will address several underlying legal issues posed by Liberty's Supplement.

First, Liberty strains mightily to demonstrate in the first fifteen pages of its brief that it in fact had reasonable assurance of the availability of its site, despite the ALJ's, Review Board's and full Commission's previous findings to the contrary.[2] That factual determination is, of course, a necessary element of the finding most germane to the present inquiry: whether Liberty misrepresented the availability of that site. For if the site had actually been available, Liberty's certification that it was available could not have been a misrepresentation. Under well-established principles of res judicata, however, Liberty cannot be permitted to re-open and re-litigate a factual issue which this administrative agency has finally resolved.

In the seminal case of United States v. Utah Construction and Mining Company, 384 U.S. 394, 421-2 (1966), the Supreme Court held that the principles of res judicata apply with equal validity to administrative decisions as to judicial ones. "When an administrative agency is acting in a judicial capacity and resolves disputed issues of fact

[2] See National Communications Industries, 6 FCC Rcd. 1978, 1979 (Rev. Bd. 1991), affirming 5 FCC Rcd. 2862, 2866 (ALJ 1990); National Communications Industries, 7 FCC Rcd. 1703 (1992); Liberty Productions, Inc. 7 FCC Rcd. 7581 (1992).

properly before it which the parties have had an opportunity to litigate, the courts have not hesitated to apply res judicata to enforce repose." This was exactly the case presented here. The issue of the availability of Liberty's site was specifically designated by the Administrative Law Judge. The issue was fully explored in discovery and at hearing by Liberty and the other parties to this case. After that full exposition in a trial-type hearing, the ALJ found that Liberty did not have a site available. The same issue was presented to, argued before, and resolved by both the Review Board and the full Commission. The Commission's adverse resolution of that issue was final within the meaning of the Section 402(b) of the Act, permitting Liberty to go to the Court of Appeals to seek review of that determination. While the FCC's determination in this regard was, and is, still subject to review at the Court (since the Court never addressed the merits of that particular issue), the Commission's consideration of this matter was full and final.[3]

We thus indisputably have all elements necessary for application of the doctrine of res judicata: (a) the party to be estopped was a party to the proceeding; (b) the issue is the same issue as previously considered; (c) the parties had an opportunity to litigate the issue; (d) the issue was actually litigated and (e) was necessary to the prior judgment. Beehive Telephone Company v. Bell Operating Companies, 12 FCC Rcd. 17930 (1997). The Commission has consistently given full effect to the doctrine of res judicata to avoid the waste of resources and judicial inefficiency entailed in re-litigation of issues which have already been fully litigated. Montgomery County Media Network, 66 RR 2d. 928 (Rev. Bd. 1989); Jerry E. Gastil, 4 FCC Rcd. 3977 (PRB 1989); Barry Skidelsky, FCC Rcd. 1392 (1992). Nor does anything in the AGC's November 23, 1999 Order in any way suggest that the Commission was prepared to re-open an issue which had been fully resolved long ago; namely, the fact that Liberty did not have a site available when it so

[3] The doctrine of res judicata applies to a prior administrative determination adverse to the claimant even though the agency's determination was not "subject to the scrutiny of judicial review." Harrah v. Richardson, 446 F.2d 1 (4th Cir. 1971).

certified in 1987. The only issue which the Commission is looking into now is the question of whether Liberty's certification that its site was available constitutes a disqualifying misrepresentation. In other words, Liberty's attempt to re-litigate the issue of the availability of its site must not and should not be allowed under the principle of res judicata. None of the underlying facts have changed since 1987 or since the hearing on the matter, and Liberty has advanced no new ground whatsoever to revisit a matter which has already been fully litigated before this agency.

It could be argued, of course, that even the question of misrepresentation itself has been finally decided by this agency. Liberty's disqualification on this basis was explicitly presented to both the Review Board and the full Commission for consideration and review. Neither panel chose to disturb the ALJ's findings on this point, stating that it was unnecessary to reach that issue because Liberty had already been disqualified on other grounds. Under normal principles of administrative or judicial action, a determination by a subordinate authority which is not reversed or modified by a superior authority becomes and remains the law of the case. An ALJ's findings and conclusions, unless reversed or modified, are binding in other cases. Montgomery County Media Network, supra; Cf. Georgia Public Telecommunications Corporation, 7 FCC Rcd. 7996 (1992). Here the ALJ made explicit and damning findings and conclusions regarding Liberty's misrepresentation of the availability of its site. The Commission chose not to disturb those findings and conclusions. They therefore became the agency's final word on that issue as well.

Having said that, however, BFB suggests that the better course here is for the Commission to affirmatively review and adopt the ALJ's findings and conclusions so as to preclude any basis for attack on appeal. As noted above, the ALJ not only had an opportunity to view and assess the credibility of the witnesses before him when the facts

were fresh, but his decision is amply supported by a mountain of evidence which Liberty conveniently ignored in its Supplemental Brief.

Second, Liberty predicates much of its brief on a personalized, ad hominem attack on the ALJ, an individual who is no longer with the agency. Liberty is apparently attempting to diminish the preclusive effect of the ALJ's adverse credibility findings based on his assessment of Ms. Klemmer and Mr. Warner. To support this vitriolic diatribe against a respected and venerable ALJ, Liberty points to the determination made by the ALJ in connection with its March 20, 1989 Petition for Leave to Amend. In deciding whether to accept Liberty's amendment, the ALJ was required by the pertinent law at the time to make a preliminary finding of whether Liberty had a site available to begin with. For under the law governing site amendments, an applicant had to demonstrate that it had a site in the first place before it could amend to a new one. 62 Broadcasting, Inc., 4 FCC Rcd. 1768, rev. den. 5 FCC Rcd. 830 (1990); South Florida Broadcasting Co., 99 FCC 2d. 840, 845 (Rev. Bd. 1984). The burden was on the moving party, Liberty, to make that showing, and the ALJ then had to grant or deny the petition for leave to amend based on the material that Liberty had presented as of April 5, 1989. The procedures attaching to site amendments necessarily entailed a preliminary determination by the ALJ as to the availability of the initial site based on the papers before him at the time. Such amendments were routinely acted on in hundreds of cases without a charge that the ALJ had "pre-judged" the ultimate issue. Had the ALJ found, based on the fuller evidence presented at the hearing, that Liberty's original site had been available, he could then have permitted the amendment if Liberty so requested. Unfortunately for Liberty, the evidence presented at the hearing fully corroborated the ALJ's initial determination that the site was not available, a factual determination which both the Review Board and the full Commission specifically affirmed. Under these circumstances, Liberty's attempt to somehow blame and discredit the judge for its own reprehensible conduct should not be countenanced.

CONCLUSION

Liberty has been charged with a multifarious array of misconduct in a series of motions to enlarge issues filed subsequent to the close of the auction. Those issues in themselves will require either the outright dismissal of its application or the conduct of further hearing proceedings. With respect to its past misconduct, Liberty is now trying to overturn well-settled principles of res judicata by re-litigating a factual issue which was already decided by the Commission after a full and fair hearing. Any such attempted re-litigation should be rejected, not only for all the reasons of judicial economy, consistency and efficiency which underlie the doctrine of res judicata, but also because it would be fundamentally unfair to the other applicants . Those applicants' bidding strategies in the auction were necessarily colored by their understanding that Liberty had been disqualified on character grounds by this agency after a full hearing. To somehow reverse that decision with no change in the underlying facts or law would be grossly unfair and improper. Indeed, it would strongly suggest that an applicant who is willing to pay the Commission a substantial amount of cash will be judged more leniently, on that basis alone, than applicants who are merely asking for a license for free. Assuming that such is not the case, the Commission should adhere to its earlier determination that Liberty is disqualified.

Finally, it bears mention that Liberty entered into the auction and participated with its eyes wide open. It knew it had been previously disqualified. It knew its misconduct would affect its qualification to receive a license. Yet it chose to participate in the hope that its past sins would somehow be remitted once it became the auction winner. Disqualification of Liberty is therefore not only perfectly fair to Liberty, but will

also serve to warn other miscreants that merely winning an auction will not absolve them of the consequences of their past offenses.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Marianne Wegrzyn, a Secretary at the firm of Donelan, Cleary, Wood and Maser, P.C. hereby certify that the foregoing BFB's OPPOSITION TO SUPPLEMENTAL BRIEF was mailed by first class mail, postage pre-paid, to the following persons on this 7th day of January 2000.

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